Smokescreen or the Real Deal: Website Privacy Notices

Gehan Gunasekara & Nora Xharra
The University of Auckland Business School

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Introduction

- Privacy public issue in NZ and overseas
  - E.g. Snowden, multiple breaches by Govt. agencies
- NZ individuals high Internet users (95%)
- Business vulnerable
  - E.g. UMR poll (2014) 81% concerned about business sharing personal information (PI) by business
  - 52% thought Internet businesses untrustworthy
- Earlier research on corporate governance and privacy through stakeholder recognition
- This research focuses on websites alone of listed companies in NZ with limited international comparisons.

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Paper outline

- Why have privacy notices
- Survey methodology
- Accessibility of notices
- Online interactions with individuals
- PI sharing with third parties
- Transparency for law enforcement requests
- Dealing with privacy breaches
- International sector comparison
- Conclusions and best practice

Function and utility of notices

- Informing consumers of companies' practices re collection, use and disclosure of PI
- Only 25% in NZ read and understand notices!
- Legal compliance: Privacy Act 1993(NZ)/ Privacy Act 1988 (Aus.) – privacy principles: IPPs & APPs
- USA: no over-arching rules but sector-specific laws
- Federal Trade Commission (FTC) enforces prohibition against unfair or deceptive acts and practices
  - E.g. Google, Twitter & Facebook settlements

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More on Function and utility…

- Overseas research that notices have benefits for businesses
- PI = new currency:
  - The way choices framed influence conduct (Solove)
  - Individuals more likely to share when feel in control
- Perception and trust key
- Reality very different: protection of corporate interests paramount
  - "obfuscatory language, unclear or undefined policies…pose virtually no restriction on businesses to profit excessively from the collection and use of [PI]."

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What about NZ?

- Do similar concerns arise?
- Earlier Privacy Commissioner (OPC) research (2006) limited
- Best Practice Guidelines
  - OPC guidance
  - OECD Working Party on Information Security
  - Australian Information Commissioner (OAIC) Privacy Policy Tool

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Survey Methodology

- Review of online privacy notices
- Data Set: (1) NZX and, for comparison (2) NYSE (New York Stock Exchange)
- Time frame: December2013- January 2014
- Some exclusions,
  - non-company issuers such as income funds & trusts
  - Additional securities of companies already included in sample
  - Companies with no websites listed on NZSX Main Board
- 129 companies – NZ incorporated (108) + overseas incorporated (21). Comparisons between subsets

Accessibility

- Accessibility of privacy notices now legal requirement in Australia: APP 1.5
  - OAIC Guidelines (limited exceptions): policy must be "prominently displayed, accessible and easy to download."
  - Note: APP 5.2 requires content such as access & correction rights plus complaints procedures
- Paper argues IPP 3(1) "reasonable steps" when PI collected imposes above requirements when:
  - Business conducted online
  - Job applications online
- Note: APPS apply to NZ companies with goods & services in Australia

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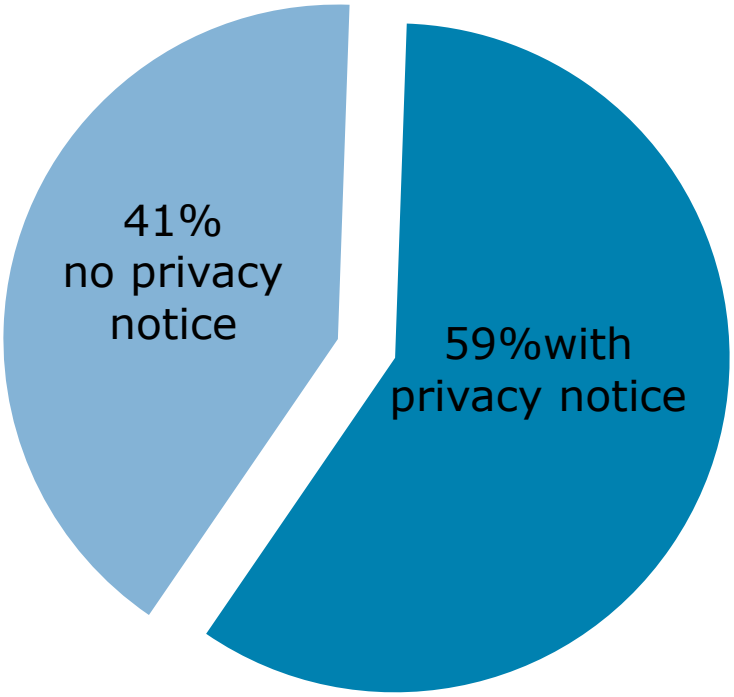
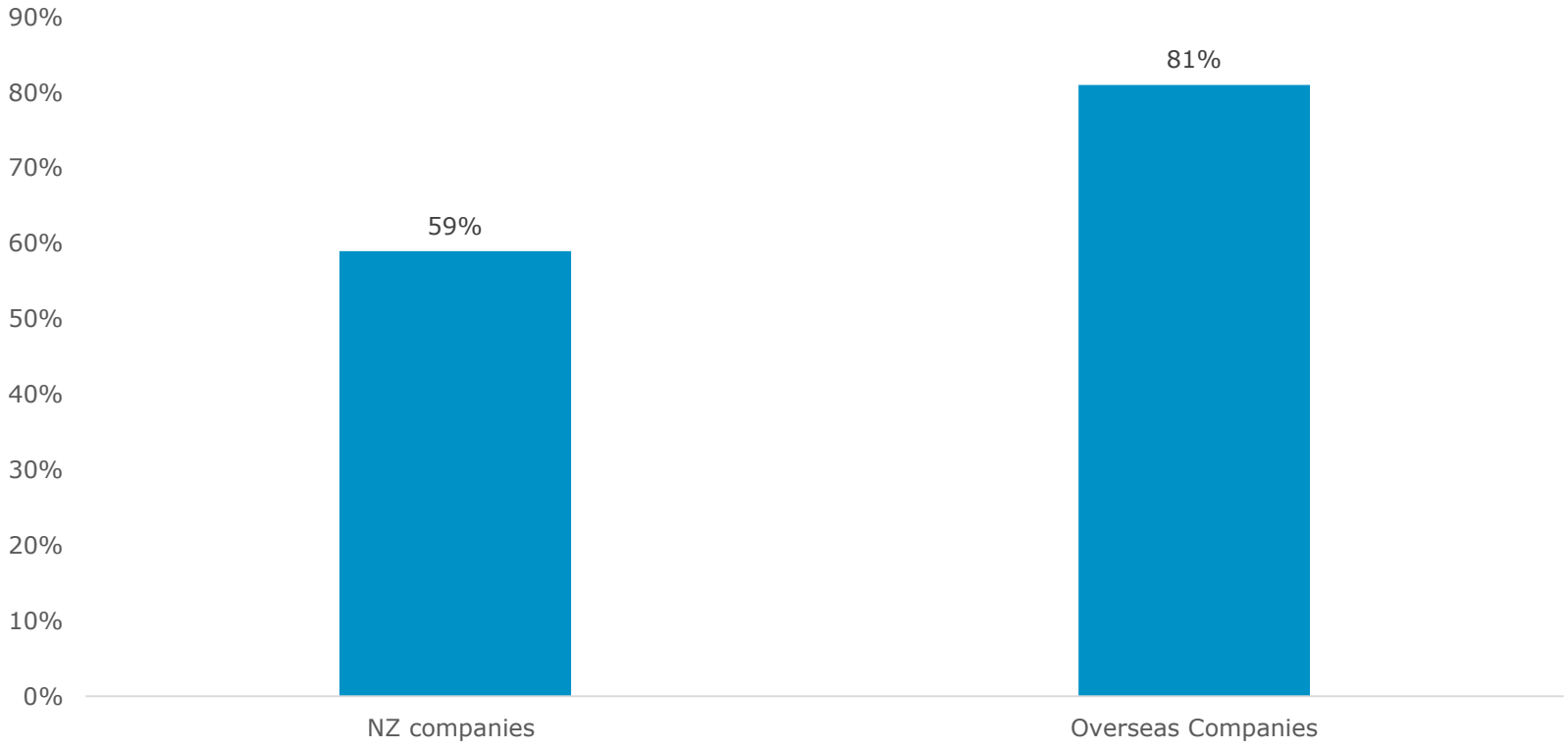
New Zealand companies with notices



Nz companies with notices cf to overseas companies



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More on accessibility

- Where located: 83% on home page **tip 1** (84% footer)
- Where located: stand-alone **tip2** or embedded within other categories
- Of NZX sample 30% buried
- brevity and comprehensibility
  - More comprehensible means more likely to read and trust
- Best practice no more than 7 categories **tip 3**
  - 75% of NZ companies met requirement

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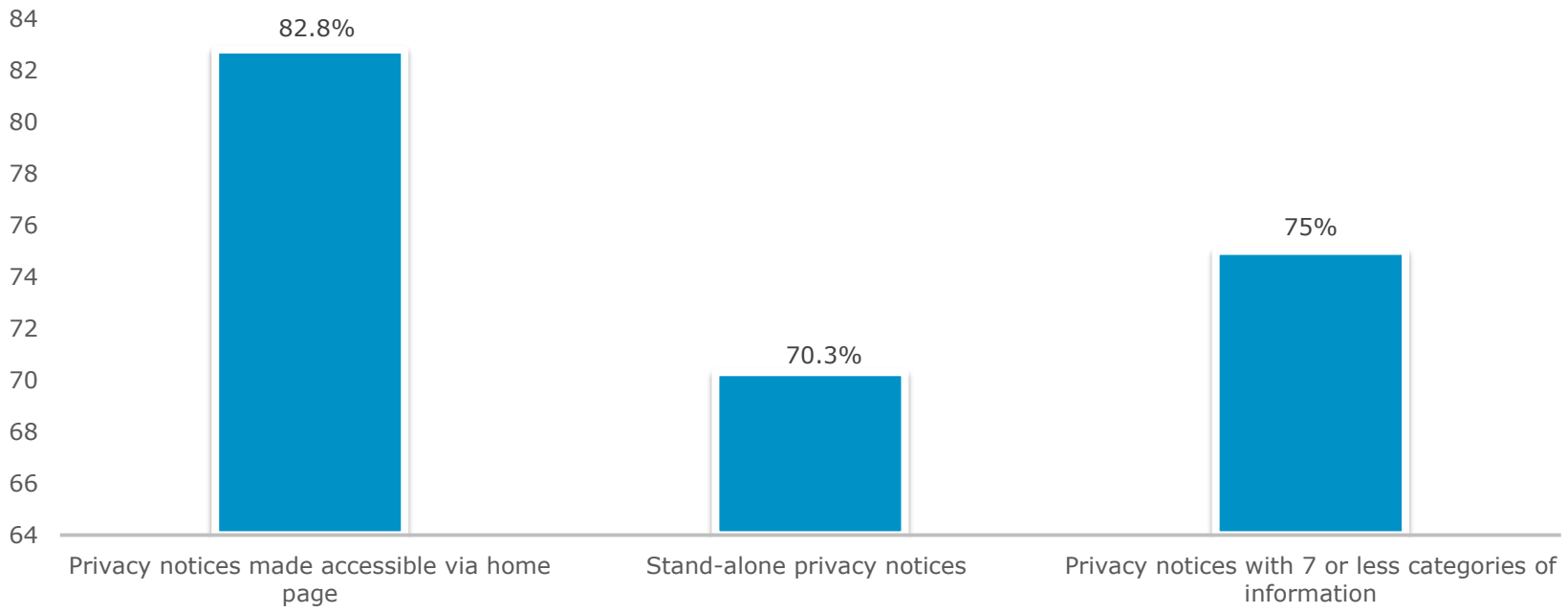
Findings re accessibility (NZ Listed)



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Examples of poor practice

- "obfuscatory language, unclear or undefined policies" **tip 4**
  - Meaningless statements
  - Non-existent statements
  - Free-riding on Privacy Act 1993
  - Emphasis on protecting selves from liability

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Examples

- The purpose of this privacy policy is to inform you of how we collect and use personal information through websites which are owned or operated by Rakon and have an address (or URL) which contains "Rakon" (the "Websites") or Rakon branded websites which are hosted by a third party (the “Rakon branded Websites”) the “Websites” and the “Rakon branded Websites” together for the purposes of this policy are referred to as the “Rakon Websites”). It also explains how we protect your privacy and what control you have over your information.
- [re independently owned/operated website links]: Rakon has no responsibility or liability whatsoever for the privacy policies of the Rakon branded Websites or any third party in dependent sites.
- By visiting the Rakon Websites and continuing to do so you indicate your consent to the collection and use of personal information in accordance with this privacy policy.
- Privacy Compliance
- Our privacy policy is compliant with the New Zealand Privacy Act 1993.

This Privacy Statement is subject to change without notice.

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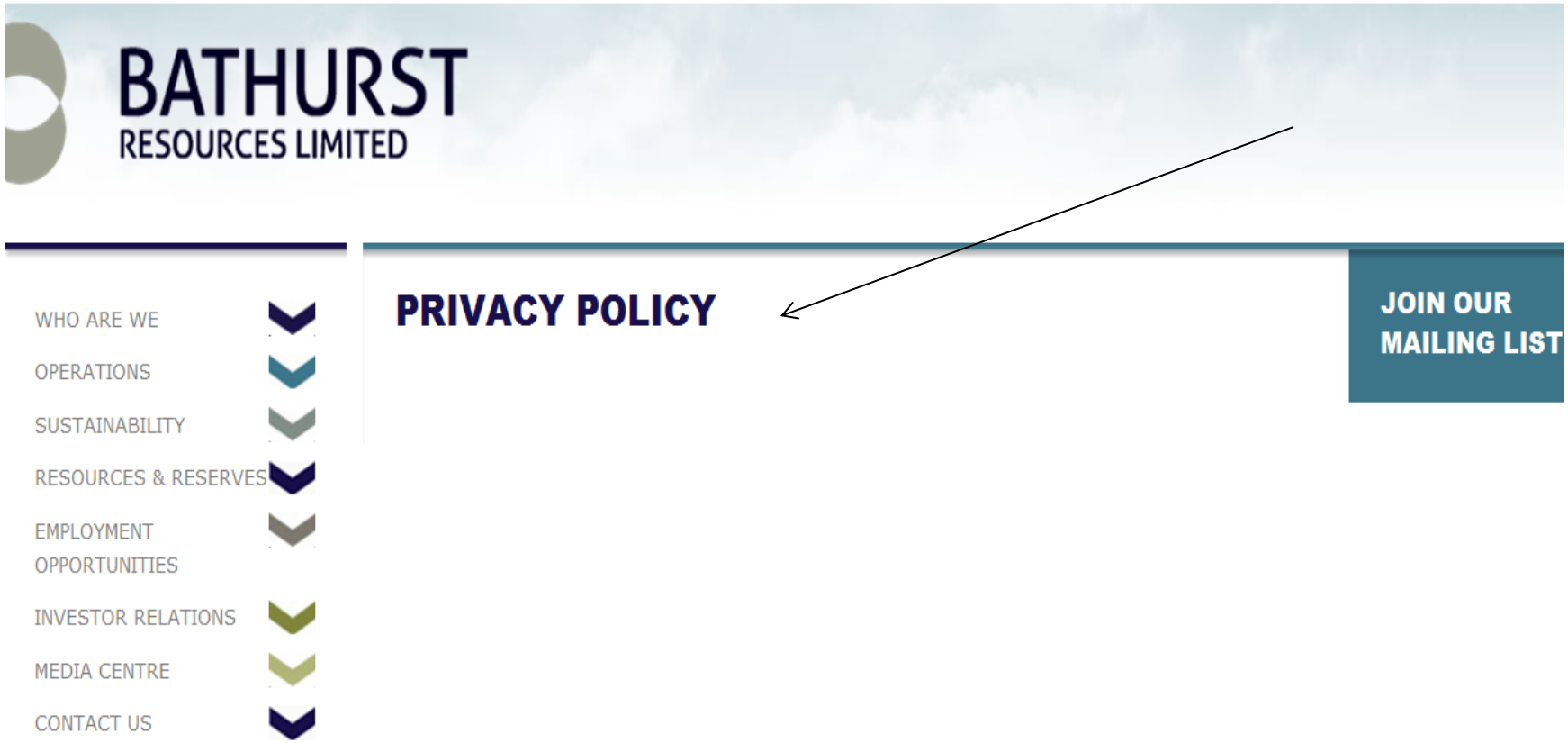
Or in some cases notices don't exist



Readability

- Flesch Reading Ease Score
  - Equation-based approach used
  - Scores <60 classified as difficult to comprehend
  - Range was between 5.3 and 73
  - Average was 40
  - Corroborates USA research that notices aimed above High School level
  - Limitations of method – present study more qualitative in focus

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Examples

I/We understand that there is no obligation to provide personal information but failure to do so may prejudice my/our chance of obtaining finance.
I/We declare that the information contained in this application is true and correct and that I/We are not an undischarged bankrupt.
I/We understand and authorise Dorchester Pacific Limited and all subsidiary companies (as defined in the Companies Act 1993 ("Dorchester") to undertake all necessary inquiries to obtain, and to use the personal information I/We have provided, to obtain information from Veda Advantage's credit reporting service, any other credit reporting agencies, credit providers, my/our employers, accountant, or any other source, to obtain, check and exchange (both now and in the future) such personal, financial and commercial information and references about me/us as is necessary for the purposes of considering this application, the protection and administration of any loan arising out of this application and in the enforcement of any agreement between me/us and Dorchester. I/We also authorise Dorchester to disclose information about any loan arising out of this application to any potential assignee of this loan or to any person providing services in connection with refinancing this loan, or to any person or organisation you have authorised to obtain information, at any time in the future.

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Better practice

- Shielding companies from liability possible factor in overseas notices
- But does not necessitate abstruse language
- What matters is not to mislead
- OECD Working Party on Information Security and Privacy *Making Privacy Notices Simple*
  - Layered statements **tip 5**
  - Unusual terms e.g. server overseas
  - Note APP 1 Australia

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Multi-layered notices

Telstra Privacy Notice

ANZ Privacy Notice

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Findings re layered statements

- Only one NZ incorporated
- Two overseas incorporated
- USA snapshot sample too small
- Examples where used provide model:
  - Link to detailed policy can protect against liability
  - Short form can contain selected details e.g. PI collection from third parties ensuring statement not misleading
  - C.f. burying such details in full policy

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Online Interactions/ Business

- OPC study (2006) suggested focus on online collection of PI
- Online collection included:
  - Online portal for PI reception e.g. employment
  - Online accounts
  - Goods & services online including bidding/auctions
- Excluded simple online contact and downloadable forms with no online transmission
- Privacy notices and access & correction rights more compelling

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Some legal considerations

- Argument that identity of information collector & intended recipient/purposes self-evident
  - *Harder v Proceedings Commissioner* [2000] 3 NZLR 80 at 91
  - Professor Roth: IPP 3(1) test not whether or not it would be reasonable to inform the data subject of their rights, but whether the agency has taken "such steps (if any) as are, in the circumstances, *reasonable to ensure that the individual concerned is aware* of" their rights.
  - Does not give agencies a discretion not to inform individuals of their rights at all.

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Online interaction findings

- Improvement on OPC findings
- 89% of NZ incorporated c.f. 52% (OPC)
- Performance by overseas incorporated companies on par
- Sloppy practices depressed performance

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Online interaction cont'd

- Right to access and correct PI important aspect
- Under new APP 5.2(g) requirement to notify *how* to exercise right in Australia
  - Also APP 5.2(h) how to complain about breaches
- Results of survey:
  - 67% of NZ incorporated c.f.
  - 78% of overseas
- Companies with access & correction providing contact point
  - 68% of NZ incorporated c.f.
  - 75% of overseas

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Collection and transfer of PI to third parties

- Act contains requirements and transparency for both
- Information sharing often necessary in commerce
  - Agents
  - Subsidiaries

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Survey methodology for third party interactions

- Clauses deemed to be transfer to third party where PI transfer not related to the purpose of collection from individual
  - E.g. contractor delivering or servicing goods
- Where clauses failed to specify that limitation for use by third party as above → deemed third party transfer
- Example: Trade Me:
  - "Where Trade Me contracts third parties to undertake various services, we may provide those third parties with personal information required to fulfil those services."
  - "…may also use third party customer relationship management services"

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Methodology cont'd

- Transfer to related companies/bodies corporate classified as third party where purpose of transfer not transparent
- Transfers to credit reporting agencies/credit card companies treated as third party transfers
  - Credit Reporting Privacy Code 2004 permits such transfer
  - Best practice to include a link/contact details to the recipient **tip 6**
  - Best practice
  - Potential transfers in context of liquidations/mergers not classified as third party transfer but is good practice

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Example of third party transfer

Use of Information Collected

Millennium may share the customer information it collects with its personnel and with the owners and operators of the MHR Hotels. Millennium may also share the customer information with selected third parties who offer goods or services that may be of interest to the MHR customers. Millennium may also share such information with other companies with whom it has entered into cooperative or co-sponsored promotions for products or services. When customers use credit cards to purchase goods or services, Millennium may share information provided by customers with the relevant credit card company.

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Survey findings re third party interactions

- 30% of NZ incorporated c.f. 41% of overseas incorporated
- Degree of choice afforded e.g. opting out of direct marketing & from cookies
- 39% of NZ incorporated c.f. 65% of overseas incorporated
- Only 5 of the NZ incorporated companies (4%) provided right to opt-out of third party transfer altogether

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Transparency for Law Enforcement Requests of PI

- Legitimate transfers for law enforcement purposes permitted by privacy principles
  - Note: principles often confer **discretion** to disclose
- Survey focused on transparency concerning such requests
- Formal Transparency Reports (only 1 – Trade Me)
  - Refers to legal grounds under Privacy Act
  - Breakdown by agencies requesting
  - Breakdown by legislation under which sought
  - Did not however indicate % requests complied with c.f. say Facebook's Report

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Findings re transparency

- Survey assessed notices for clauses relating to law enforcement requests
- 52% of NZ incorporated companies c.f.
- 59% of overseas incorporated companies
- Conclusions: best practice even though not legal requirement **tip 7**

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Dealing with privacy breaches

- NZ Law Commission recommends mandatory notification when breach occurs
- Currently no requirement and no companies in survey
- Survey also assessed whether complaints mechanisms present
  - Under APP 1.4(e) privacy policy must state how individual can make complaint and how dealt with
- Findings:
  - 19% of NZ incorporated c.f.
  - 35% of overseas incorporated companies
  - ANZ is good example

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Conclusions….

- Findings relevant in light of enhanced transparency now required by new Australian privacy principles and need for trust in online business
- Overseas companies surveyed outperformed NZ ones in most categories
  - Some exceptions e.g. length and information sharing with third parties
- NZ and overseas companies could improve in relation to online collection of PI e.g. access & correction and breach procedures

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Conclusions re best practice

- Need not be trade-off between quality & length
- Accessibility best served by stand-along vs. notices being part of terms and condition
- Avoidance of legal jargon and abstruse language
- Reviewing notices regularly good idea